United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7240

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES LABOR PARTY, a/k/a/ NATIONAL CAUCUS OF LABOR COMMITTEES; ANTON H. CHAITKIN; ELIJAH C. BOYD; DAVID WOLINSKY; ROBYN PRESS; JEFFREY BRYAN,

Plaintiffs-Appellees,

against

MICHAEL J. CODD, individually and as Commissioner of the Police Department of the City of New York,

Defendant-Appellant,

and ANTHONY ELAR, individually and as Chief of Police of Freeport, Long Island,

Defendant

On Appeal from The United States District Court
For The Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

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Docket No. 75-7240

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BRIEF FOR PLAINTIFFS-APPELLEES

QUESTIONS PRESENTED

1. Is a license fee for the use of sound equipment by political parties during an election campaign unconstitutional?

2. Is a license fee for the use of sound equipment on public streets by political parties during an election campaign unconstitutional where the public authorities do not demonstrate

that the fee provision advances a compelling state interest for which there is no less drastic alternative?

3. Is a licensing system for the use of sound equipment on public streets which allows public officials unfettered discretion in deciding whether the license may cover more than one location or only one location constitutional?

STATEMENT OF THE CASE

Appellee United States Labor Party ("U.S.L.P.") is an unincorporated political association representing a class of persons supporting candidates seeking political office in the state and federal elections within this Circuit. (4a) Appellee Anton H. Chaitkin ("Chaitkin") is the U.S.L.P. campaign director and was a candidate for Governor of the State of New York in 1974 (4a). Appellee Elijah Boyd ("Boyd") was the U.S.L.P. candidate for the United States Senate from the State of New York for the 1974 election (4a). Political candidates of the U.S.L.P. intend to par-

ticipate in upcoming state and federal elections (96a).

Prior to initiation of the instant action the U.S.L.P. and its candidates were engaged in the process of collecting signatures from qualified voters for petitions nominating nine candidates for state and federal office in New York State under an independent party status (5a, 12a). In order to gather signatures Appellees conducted street campaigns wherein they used sound equipment ("bullhorns") to inform residents of the state of their campaign and to encourage such residents to sign their respective petitions (6a).

Appellees had to collect at least 60,000 signatures for the 1974 election within a deignated period of approximately 40 days (13 a). Appellees anticipate similar participation for future elections (96a).

Appellees alleged that the use of bullhorns was essential for purposes of gathering enough petition signatures to be placed on the ballot (9a). Appellees also sought to comply with Section 435-6.0 of the New

York City Administrative Code (hereinafter referred to as the "ordinance") but they were unable to pay the $5.00 fee required for each specific location where they conducted a petition gathering rally (7a)[1]. Appellees would conduct a rally at one location and when the crowd dispersed move to another location. Appellant, by and through his agents, would then request to examine the Appellees permits and in the absence of such permits, issue them a summons or advise them to cease use of the bullhorns (28a-30a). Appellees contended that the foregoing rigid and discriminatory enforcement of the fee requirements caused them to either spend large sums of money for payment of fees and/or for summons fines and that the same violated their constitutional rights (7a). In other words, nine candidates speaking at ten different locations on a daily basis could conceivably be required to pay a total of $450.00 per day.

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[1]Section "h" of the ordinance requires:
"h. Fees--Each applicant for a permit issued under the provisions of this section shall pay a fee of five dollars for the use of each device or apparatus for each day, provided, however, that permits for the use of such sound devices or apparatus shall be issued to any bureau, Commission, board or department of the United States government, the State of New York, and the City of New York without fee.

The ordinance permits one to obtain a permit good for one day for a specific location (112A). The ordinance does not expressly authorize the issuance of multiple locations for each permit (110a-113a) nor do the regulations of the police department appear to provide for the same (120a). Appellant,(by his agent Deputy-Commissioner Neco) claims that the practice of the department is to issue multiple locations for each permit (120a) but Appellees contend they have been required to pay $5.00 for each permit site (7a, 31a, 32a). Appellees believe that the ordinance is therefore so vague as to be discriminatory (7a).

During the course of the trial Appellant established that the fee, on the average, was related to the costs for enforcement of the ordinance (91a) but the District Court held that Appellants failed to establish that the fee is a compelling interest of the state or the absence of a less drastic alternative for enforcement of the ordinance.

Plaintiffs-Appellees brought this case as a civil rights action under 42 U.S.C. Sec. 1983 seeking equitable relief in the Eastern District of New York. A hearing was held on issues relevant to this appeal, among others, before

the Honorable Jack Weinstein, Judge Weinstein issued a preliminary injunction (50a-58a) and after further hearing a final injunction (101a).

Judge Weinstein held that the fee system of the ordinance acted as a tax on free speech in the electoral process. He found that the payment of the fee would be a substantial financial burden (51a, 102a). He found that the defendant had failed to establish either the compelling need or the lack of less drastic alternative required to justify the fee (102a).

This appeal is taken from that decision.

ARGUMENT

I. THE LICENSE FEE IS UNCONSTITUTIONAL

The District Court held (104a) the $5.00 fee for each use of sound equipment acts as a direct tax on the exercise of free speech. Well established Supreme Court precedents support the Courts decision.

In Murdock v. Commonwealth of Pennsylvania 319 U.S. 105, (1943) the Supreme Court set forth

a well-settled rule which is applicable to Appellees herein. Also see e. g. Grosjean v. American Express 297 U.S. (1936). The Court ruled unconstitutional a city ordinance which required the Jehovah's Witnesses obtain a license for the sale of literature. The license cost $1.50 per day or $20.00 for three weeks and entitled the bearer to canvass the entire city. It was not the amount of the tax or the plaintiffs' ability to pay that was decisive in the Court's decision. To the contrary, the Court stated:

> "It is contended, however, that the fact the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of the tax. It is a license tax --a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." 319 U.S. at 112-113.

A year later, the Supreme Court reaffirmed and extended its ruling in Murdock, supra, with its decision in Follett v. McCormick, 321 U.S. 573, (1944). The Court in Follett voided a tax of $1.00 per day or $15.00 for a license for the sale of literature, and declared that a person may even earn his living by the sale of protected literature without thereby forfeiting his right

to be free of a flat tax on his First Amendment rights. Subsequent to Murdock, supra, there are numerous cases involving the factual matters analagous if not almost identical to those presently before this Court, in which federal courts have overwhelmingly invalidated statutes that attempt to impose a license tax on First Amendment rights. Among these are: Busey v. District of Columbia, 138 F. 2d. 592 (D.C. Cir., 1943), in which the Court invalidated a fee on literature of $1.00 per month or $12.00 per year; Strasser v. Doorley, 432 F. 2d. 567 (1st Cir., 1970), which struck down a city ordinance requiring the acts of registering, procuring (for $.50) and wearing a badge; Wulp v. Corcoran 454 F. 2d. 826 (1st Cir., 1972) which held a city ordinance unconstitutional requiring a $.75 fee and the wearing of a badge; and Gall v. Lawler , 322 F. Supp. 1223 (E.D. Wisconsin, 1971), where the Court invalidated a city ordinance that required a $5.00 fee per day for a peddler or solicitor or $100.00 per day fee for a transient merchant, as applied to an underground newspaper; accord, Hull V. Petrillo 439 F. 2d 1184 (2nd Cir. 1971).

In International Society for Krishna Consciousness Inc. v. Conlish, 374 F. Supp. 1010 (N.D.Ill., 1973), the Court did not state nor consider the amount of the fee required by the city ordinance in question, but simply stated that a municipal ordinance making it unlawful for any person to engage in the business of a peddler without a license was constitutionally inapplicable to the First Amendment activities of said organization. The Court quoted from a case relied upon by the U.S. Supreme Court in Murdock , supra, City of Blue Island v. Kozol, 379 Ill. 511, 41 N.E. 2d 515 (1942), in which the Illinois Supreme Court stated that a person "Could not be compelled to purchase through a license fee or a license tax, the privilege freely granted by the constitution." Blue Island, p. 519.

Also see Universal Specialties, Inc. v. Blount, 331 F. Supp. 52, (C.D. Cal., 1971), wherein the district court struck down Post Office regulations concerning unwanted mail because they were implemented incorrectly, and noted that, "The impositions of financial burdens to suppress constituionally protected material is clearly

an unconstitutional restraint on free speech and press." (relying on Murdock, supra)

A tax on the exercise of First Amendment rights is viewed with special stringency in the context of an electoral campaign, as the District Court noted (105a).

See the series of electoral fee cases, Harper v. Virginia State Bd. of Elections, 383 U.S. 663, (1965), in which the U.S. Supreme Court held that a state poll tax of $1.50 violated the Fourteenth Amendment insofar as it makes the affluence of the voter or payment of any fee an electoral standard; Bullock v. Carter, 405 U.S. 134, (1971), where the same court held that a statutory filing fee should be borne by the state; and Lubin v. Panish, 415 U.S. 709, (1974) in which the Supreme Court invalidated a filing fee statute on the basis that it denied a person the right to file as a candidate solely because of an inability to pay a fixed fee. The foregoing cases, while not definitely on point with the matter herein, clearly indicate that the highest court of this land is reluctant to condone or approve any statutory standard which directly or indirectly causes ones First Amendment (particularly electoral) rights to be

contingent upon payment of a fee.

The District Court elucidated the tax aspect by showing that placing the administrative costs of speech on the speaker, when other public expenses are borne by all, is the essence of an unconstitutional tax (108a).

> "If a bureaucratic system is needed to protect the rights of the majority without inhibiting those of the minority, the question is who should pay for that bureaucracy. It is the majority that appears to wish the protection so that there is no unfairness in it paying the cost. Moreover, spread over the entire community, the cost per person is miniscule, whereas if it were placed entirely upon those who have the urge to speak publicly in an amplified manner, the costs would be so prohibitive as to substantially inhibit many of them from exercising their rights. In the case before us we have the additional factor that the cost to the majority would actually be reduced if no fee were charged, since collecting the fee costs more than is collected"
>
> Memorandum and Order (108a)

Because the right to vote is essential to First Amendment freedoms, a tax such as the filing fee here, which falls directly on the campaign process must be held to be in violation of the First Amendment.

II. THE LICENSE FEE IS NOT NECESSARY TO ADVANCE A COMPELLING STATE INTEREST

A state law which imposes a direct burden, however small, on the right to vote must clearly be subjected to the"compelling interest" test.

Harper v. Virginia Board of Elections, 383 U.S. 663, (1966); Kramer v. Union School District, 395 U.S. 621, (1969). In Dunn v. Blumstein, 405 U.S. 330, (1972) the Supreme Court extended the compelling interest test to durational residence requirements laws for voting. Also see Wellford v. Battaglia, 343 F. Supp. 143 (D.C. Delaware, 1972) (residency requirements for public office); Van Dursatz v. Hatfield, 334 F. Supp. 870 (D.C. Minnesota, 19 .) (public education), and Williams v. Rhodes 393 U.S. 23, (1968).

The foregoing decisions recognize that when fundamental rights are involved, there is a possibility of invidious discrimination, and the state must pass the stricter "compelling interest" test. The state must demonstrate that the law is necessary to promote a compelling state interest. "Necessary in this context is interpreted to mean that there is no other alternative available to protect the government interest involved which will involve a lesser burden on the right restricted;" Wellford , supra, at p. 145. Where the rights threatened include freedom of speech and political functioning, as

in this case, the compelling interest test should be employed.

The Court in Wellford, supra, noted that the U.S. Supreme Court in Williams, supra, "applied the compelling interest test because the Ohio statute involved gave the 'two old, established parties a decided advantage over any new parties struggling for existence and thus place (d) substantially unequal burdens on both the right to vote and the right to associate'" Wellford, supra, at p. 147, note No. 7. In the instant matter Appellee U.S. L. P. is also a new political party and its main means of organizing is on the public streets, as opposed to the two established parties which have much greater access to mass media, and therefore Sec. h of the ordinance places a much greater burden upon the U.S.L. P.

Where the most basic freedoms are involved, freedoms of speech and political franchise, the state must be called upon to demonstrate that the law is necessary to promote a compelling state interest, and that there is no alternative available to the state, before it can be allowed to impose on First Amendment rights. See Shelton

v. Tucker, 364 U.S. 479 (1960); Sherbert v. Verner, 374 U.S. 398 (1963); and Note, "Less Drastic Means and the First Amendment", 78 Yale L.J. 464 (1969).

Administrative convenience for the City of New York such as payment of the costs of the permit system, cannot constitute compelling state interest where fundamental rights are involved. See Cleveland Bd. of Education v. LeFleur, 414 U.S. 632, 646 (1974). Such a justification is circular, because the City would have only to set up a permit system which necessarily costs money, in order to justify the imposition of a fee. As the District Court pointed out (102a), the mere existence of a licensing system does not justify its costs. Bullock v. Carter, 405 U.S. 134, 147 (1972); Emerson, System of Freedom Of Expression , p. 310-311 (1970). Also see Schneider v. State, 308 U.S. 147, 162 (1939)

The prevention of noise or preservation of peace and quiet cannot justify the fee and attendant administrative apparatus. As the District Court noted:

> "Although other members of the New York community may be entitled to quietly worship and attend court or school without undue interference from the amplified exercise of First Amendment rights, they can be protected, as provided in the specific terms of the ordinance, without charging loudspeaker fees."
>
> Memorandum and Order (107a)

The ordinance in itself provides alternative protections by regulating place and time, to advance those interests. See Sec. (g) of the ordinance.[2] Furthermore, the use of amplifiers in this case occurred in an electoral campaign in which the use of amplification is often essential. See Record herein, Minutes of Hearing before the Honorable Edward R. Neaher, August 15, 1974, p. 13 and Saia v. New York, 334 U.S. 558, 561 (1948).

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[2]"g. Special restrictions. The Commissioner shall not issue any permit for the use of a sound device or apparatus:

1. In any location within five hundred feet of a school, courthouse or church, during the hours of school, court or worship, respectively, or within five hundred feet of any hospital or similar institution;

2. In any location where the commissioner upon investigation, shall determine that the conditions of vehicular or pedestrian traffic or both are such that the use of such a device or apparatus will constitute a threat to the safety of pedestrians or vehicular operators;

3. In any location where the commissioner upon investigation, shall determine that conditions of overcrowding or of street repair or other physical conditions are such that the use of

In a case such as this, the lack of a compelling state interest bound up with failure to show that the administrative machinery is necessary, and that no less drastic alternative will do because the permit system is not shown to advance a compelling need, it cannot be shown to be the least onerous permit system. Assuming for the moment that some permit system might be justified, the one used against Appellees cannot be the least drastic. To issue separate permits for each time and place, using separate applications and requiring renewed use of the bureaucratic machinery is surely the most cumbersome alternative, as well as the most expensive for the Appellees, who must thus pyramid their application fees (102a).

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a sound device or apparatus will deprive the public of the right to the safe, comfortable, convenient and peaceful enjoyment of any public street, park or place for street, park or other public purposes, or will constitute a threat to the safety of pedestrians or vehicle operators;

4. In or on any vehicle or other device while it is in transit; or

5. Between the hours of ten p.m. and 9 a.m."

Recent cases concerning the least drastic means test in an electoral context support Appellees' position. Kusper v. Pontikes, 414 U.S. 51 (1973). The test was also applied by a three judge federal panel in the Eastern District of Pennsylvania to invalidate Pennsylvania electoral laws on behalf of some of the same plaintiffs as the Appellees herein. See Salera and United States Labor Party v. Tucker et al. _____F. Supp. _____ (E.D. Pa., Aug. 1, 1975-74 Civ. 2340)

Cox v. New Hampshire , 312 U.S. 579 (1941), relied upon by Appellant, was decided before the development of the less drastic means test, and, in any case, would not justify a flat fee such as the one in this case.

The fee system of the ordinance before the bar is not strictly necessary to advance a compelling interest.

III. THE LICENSING SYSTEM USED IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED

While one of the Appellants witnesses claimed that a permit may be issued for multiple locations the ordinance itself provides only for a specific location, and no regulations authorize multiple

locations (120a). Appellees were issued permits for specific isolated locations (See Exhibit H. set forth at 31a-32a). It is apparent at least that the permit system allows the authorities to manipulate the licensing in such a way as to allow one fee for a number of locations or for one. Such a system is arbitrary.

Cases upon the issue of vagueness or lack of standards in the administration of permit systems are legion. See cases collected in Emerson, Haber, and Dorsen; Political And Civil Rights In The United States, pp. 582-599 (1967) Saia v. New York, supra, dealt specifically with a sound amplification ordinance, holding it unconstitutionally vague for lack of standards.

One vice of a vague licensing system is that it permits the authorities to suppress parties which are unpopular or in the minority. The power to vary the fee by varying the places is a power to penalize the less important or popular speaker.

As the Supreme Court said in Schneider v. State, supra, :

> ". . .we hold a municipality cannot. . . require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with

> a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house."
>
> 308 U.S. at 164

The arbitrary power of enforcement of the fee provisions makes the ordinance in this case unconstitutional.

CONCLUSION

THE ORDER APPEALED FROM SHOULD NOT BE REVERSED

August 28, 1975

Respectfully submitted,

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PAUL G. CHEVIGNY
(On The Brief)

UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE

STATE OF NEW YORK:
COUNTY OF NEW YORK:

JAY C. CARLISLE, II, being first duly sworn, deposes and says that he personally delivered copies of the attached brief of the Plaintiffs-Appellees in the above entitled matter to the offices of counsel for the Defendant-Appellant at the Municipal Building in the City Of New York.

Jay C. Carlisle, II

Sworn to before me this

29 day of August, 1975

Jeanne Kramer

JEANNE KRAMER
NOTARY PUBLIC, State of New York
No. 41-2191700 Qualified in Queens County
Term Expires March 30, 1977